82-790

No. .....

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In The

Supreme Court of the United States

October Term, 1982

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RICHARD BARTEL,

Petitioner,

vs.

JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF IOWA

—o—

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QUESTION PRESENTED FOR REVIEW

In the absence of statutory authorization for public reimbursement of attorney fees and expenses, is it a violation of due process clause of the Fourteenth Amendment for the government to impose upon the incumbent, who has the statutory obligation to defend an election contest, the obligation to finance a defense on behalf of the electorate with his own personal funds?

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JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF IOWA

CITATIONS TO OPINIONS BELOW

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of Iowa, which became a final judgment on August 13, 1982, when the Supreme Court of Iowa entered an order denying and overruling Petitioner's Application for Further Review in the case entitled *Richard Bartel v. Johnson County and the Johnson County Board of Supervisors, et al.*, No. 2-66522 (A. p. A-2).

The ruling of the District Court of the State of Iowa in and for Johnson County in the case of "Richard Bartel v. Johnson County and the Johnson County Board of Supervisors, et al." is unreported and is printed in Appendix D, *infra*, pp. A-13 to A-17. The opinion of the Iowa Court of Appeals of the State of Iowa, printed in Appendix C, *infra*, pp. A-3 to A-12 is reported in 322 N. W. 2d 901 (Iowa App. 1982). The Petitioner filed an Application for Further Review pursuant to Rule 402, Iowa Rules of Appellate Procedure on June 8, 1982. This Application was denied and overruled by the Supreme Court of Iowa on August 13, 1982 (Appendix B, p. A-2).

STATEMENT OF JURISDICTION

The opinion of the Iowa Court of Appeals of the State of Iowa was entered on May 25, 1982. A timely Application for Further Review was filed with the Supreme Court of Iowa on June 8, 1982. The Supreme Court of Iowa denied the Application for Further Review on August 13, 1982, and the judgment of the Court of Appeals became final on August 13, 1982. This Petition for Certiorari was filed within ninety (90) days of that date. The order denying Application for Further Review referred to herein is printed in Appendix B, p. A-2. This Court has jurisdiction under 28 U. S. C. 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The State statutes and Federal Constitutional provisions involved are the following, and are printed in Appendix A at page A-1, *infra*:

1. Amendment 14, Section 1 of the U. S. Constitution;
2. Chapter 50.45, 1971 Code of Iowa;
3. Chapter 57.3, 1971 Code of Iowa;
4. Chapter 62, 1971 Code of Iowa.

RAISING THE FEDERAL QUESTION

1. In petition of Equity filed in the State trial court, Petitioner, in Division II (setting forth an implied trust claim) based his claim for restitution in the WHEREFORE clause, in part, on the Fourteenth Amendment (State Appellate Appendix, p. 7).
2. In petition of Equity filed in the State trial court, Petitioner, in Division III (setting forth a "private County Attorney" claim) raised the Due Process clause and the Fourteenth Amendment, and requested restitution, in part, on the basis of the Fourteenth Amendment in the WHEREFORE clause (State Appellate Appendix, pp. 7 and 9).
3. In the Second Amendment to Petition filed in the State trial court, Petitioner, in Division II, para-

graph 22, referred to the Federal Constitutional grounds asserted in the Petition and, in Division III, paragraph 22, referred to the "Federal constitutional grounds asserted in this Division, including Due Process and Equal Protection" (State Appellate Appendix, pp. 28-29).

4. In the Appellant's brief, filed in the State appellate court, Petitioner cited the United States Constitutional Amendments, 5, 6 and 14 in the table of authorities (State Appellate Appendix, p. vi).

5. In the presentation of the appellate argument on the solitary issue of reimbursement of attorney fees and expenses, the Petitioner referred in Appellant's Brief to the federal constitutional provisions expressly enumerated in his petition (Appellant's Brief, p. 6). In Appellant's Brief (p. 16), the Petitioner cited *Wesberry v. Sanders,* 376 U. S. 1, 17, 18, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964) and on pp. 19-20, cited *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 392-93, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) and *Hall v. Cole,* 412 U. S. 1, 4-5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973). In Appellant's Brief, p. 22, the Petitioner expressly anchored his argument for recovery of attorney fees and expenses upon the United States Constitution, Amendments 6 and 14.

6. In the Application for Further Review to the Supreme Court of Iowa, Petitioner, in the Table of Authorities, cited the 6th and 14th Amendments to the U. S. Constitution (p. iii). The Petitioner raised with the Supreme Court of Iowa

the fact that the majority (of the Iowa Court of Appeals) "did not consider controlling federal and state constitutional provisions . . ." (p. 3), and expressly cited U. S. C. A., Amendment 14 and, also, an Iowa case, *Devine v. Wonderlich*, 268 N. W. 2d 620, 623 (Iowa 1978) which was based on constitutional decisions rendered by the Supreme Court of the United States (Application for Further Review, pp. 3 and 5). The Petitioner argued for adoption of this Court's reasoning in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) (p. 7), and, in support of Petitioner's contention that his defense of an election challenge protected the political franchise deemed fundamental to democratic government, the Petitioner expressly cited U. S. C. A. 6 and 14 (Application for Further Review, p. 8).

STATEMENT OF THE CASE

On November 21, 1977, the Petitioner filed an equity suit in the Johnson County District Court against Johnson County and the Johnson County Board of Supervisors seeking from the Respondents reimbursement for attorney fees and costs incurred by the Petitioner in defense of an election contest and in other derivative lawsuits. On the 19th day of February, 1981, the District Court dismissed Applicant's petition, as amended.

On March 19, 1981, the Petitioner filed an appeal to the Supreme Court of Iowa. The case was transferred

from the Supreme Court of Iowa to the Iowa Court of Appeals for disposition, and the case was submitted to the Iowa Court of Appeals on February 3, 1982. On May 25, 1982, by a 3-2 decision, the Court of Appeals affirmed the Johnson County District Court. Mr. Bartel filed an Application for Further Review with the Supreme Court of Iowa, pursuant to Rule 402, I. R. App. P. The highest appellate court denied and overruled the Application for Further Review on August 13, 1982. The Petitioner filed the instant petition seeking redress.

AUTHORITIES AND ARGUMENT

The Iowa Court of Appeals decided an important question of federal constitutional law by denying Petitioner's application for public reimbursement of attorney fees and expenses incurred in defense of a contest of election. Petitioner contends that the ruling of the Iowa Court of Appeals has serious consequences upon the political franchise:

1. Since the political process had culminated and the Petitioner's candidacy was accepted and the candidacy of others repudiated, the funds expended by the Petitioner were in defense and protection of the choice of the electorate and the expenses incurred provided the people with legal counsel and finances to secure and protect the result of the political franchise and to secure a full and fair contest of election hearing. The electorate made no contribution to the defense fund.

2. Without public reimbursement of the Incumbent's expenses and attorney fees, a contest of election challenge itself may compel any person without the financial means to defend against the challenge, to withdraw or resign. The instant case comprises the basis for a general, more ominous principle of law in regard to future elected candidates who must finance their own defense. As the Respondents argued in this case: ". . . Mr. Bartel had the option of not defending the election contest. If he had chosen this option, he may have lost his elected position as a supervisor, but he would not have been assessed damages." (Appellee's Brief in State court, p. 10).

3. That an election contest defense which protects the political franchise should, on due process grounds, provide an overriding consideration for recovery of attorney fees and expenses, and also an exception to the American rule which, in the absence of statutory authorization for attorney fees and expenses, disallows them.

The Petitioner contends the Due Process Clause guarantees recovery of attorney fees and expenses under theories of "implied trust" and "private county attorney". The Iowa Court of Appeals appeared swept up by the fact that the Petitioner, Mr. Bartel, was, in fact, the individual who was elected and that since he was the Incumbent, this distinguished him from the group who formed the basis for claims of implied trust of "private county attorney". However, under the democratic theory of government, all citizens of Johnson County owe acceptance and support to the choice of the electorate upon the culmination of the

political process. The democratic theory of government applicable in the State of Iowa and in this action creates the class of persons that the Petitioner represents, and from whom he seeks reimbursement. The people of Johnson County are the government. Once the people elect a government officer, he or she becomes the representative of all the people, and the filing of an election challenge itself does not diminish or negate the outcome of the political process. The contestant must negate the outcome of an election by establishing, in Court, the merits of his or her election challenge.

Petitioner contends that his defense of an election challenge protected the political franchise; a franchise this Court has deemed fundamental to democratic government. *Wesberry v. Sanders,* 376 U. S. 1, 17-18, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481, 492 (1964); *Reynolds v. Sims,* 377 U. S. 533, 561-562, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506, 527 (1964). According to the reasoning and grounds contained in *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) and/or *Serrano v. Priest,* 569 P. 2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977), the Petitioner avers he is entitled to attorney fees and expenses under the theories of implied trust or "private county attorney" for the protection of a fundamental right of the electorate (U. S. C. A., Amendment 14).

The Petitioner alleges that through his efforts he created a defense fund and made expenditures to protect the political interests of a plurality of the voters of Johnson County, and the outcome of the political process, and the electorate as a class of persons, profited from the fund without having contributed to its successful creation or

maintenance, which benefited the Respondents financially. The above situation created an implied trust and the Petitioner, Richard Bartel, should receive compensation from the Respondents for the legal services and other costs the Petitioner expended on behalf of the Respondents and said compensation should be commensurate with the efforts expended in providing legal services and other costs, and commensurate with the result secured.

The Petitioner's attorneys acted in the capacity of "private county attorneys" in successfully defending the election challenge for the following reasons:

The expense of attorney fees and other defense costs brought about benefits to a broad class of citizens, and the Incumbent, by hiring attorneys to protect the decision of the ballot box, employed private attorneys who were acting *pro bono publico*. The contestant's filing of the election challenge necessitated the acquisition of legal counsel for the private enforcement of the election decision, and under the adversary procedure established by Chapter 62, The Code, the selection of counsel and the burden of defense, fell upon the Incumbent. In the election contest referred to above, the issue presented had great societal importance and the democratic principles embraced by the Federal Constitution served to vindicate the employment of legal counsel so that the election contest challenge could not improperly or illegally thwart the decision of the electorate. The number of people standing to benefit from the Incumbent's defense of the contest challenge were not only the plurality of the voters who elected the Petitioner, but also those who feel bound to uphold the results of the democratic process. The contest litigation resulted in a

vindication of a societally important public policy and the necessary costs of securing an election contest defense, and the result obtained, transcended the individual incumbent's pecuniary interest to the extent requiring subsidization by the Respondents.

In the instant case, the Petitioner, the prevailing party in the election contest, is not seeking reimbursement from the losing party, the contestant, but rather, the Petitioner is seeking reimbursement from the people of Johnson County who elected him to office and who benefited by Petitioner's financing of the defense to the election challenge. The expenditure of funds by the Petitioner, in defending the decision of the electorate, created a trust relationship between the Petitioner and the people of Johnson County (*Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U. S. at 257).

———o———

CONCLUSION

For the reasons set forth above, the Court should issue a writ of certiorari to the Iowa Court of Appeals of the State of Iowa to correct a manifest error in its ruling on the question presented.

Respectfully submitted,

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APPENDIX A

1. Amendment 14, Section 1 of the U. S. Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Chapter 50.45, 1971 Code of Iowa:

> All canvasses of tally lists shall be public, and the persons having the greatest number of votes shall be declared elected.

3. Chapter 57.3, 1971 Code of Iowa:

> The term "incumbent" in this Chapter means the person whom the canvassers declare elected.

4. Chapter 62, 1971 Code of Iowa.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 66522

O R D E R

RICHARD BARTEL,

Appellant,

vs.

JOHNSON COUNTY and the JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Appellees.

Plaintiff-appellant's application for further review is hereby overruled and denied after consideration by this court en banc.

Dated this 13th day of August, 1982.

THE SUPREME COURT OF IOWA
By /s/ W. W. Reynoldson, Chief Justice

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APPENDIX C

IN THE COURT OF APPEALS OF IOWA

RICHARD BARTEL,

Plaintiff-Appellant,

vs.

JOHNSON COUNTY and the JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Defendant-Appellee.

2-22

2-66522

Appeal from Johnson District Court—William R. Eads, Judge.

Plaintiff appeals from an adverse judgment against him in his suit to recover attorney's fees from defendant, Johnson County Board of Supervisors, arising from his successful defense of a contest to his election to the Board of Supervisors, asserting trial court erred in refusing to award attorney's fees on the following theories: (a) unjust enrichment and implied contract; (b) implied trust; (c) his attorneys acted as private county attorneys; (d) denial of attorney's fees violates the United States and Iowa constitutional provisions for equal protection; (e) the doctrines of promissory and equitable estoppel. — AFFIRMED.

Jon M. Kinnamon, Cedar Rapids, Iowa, for plaintiff-appellant.

J. Patrick White, Assistant Johnson County Attorney, for defendant-appellee.

Heard en banc.

JOHNSON, J.

Plaintiff, Richard Bartel, appeals from an adverse judgment against him in his suit to recover attorney's fees from defendant, Johnson County Board of Supervisors, arising from his successful defense of a contest to his election to the Board of Supervisors. On appeal, he asserts trial court erred in refusing to award attorney's fees on the following theories: (a) unjust enrichment and implied contract; (b) implied trust; (c) his attorneys acted as private county attorneys; (d) denial of attorney's fees violates the United States and Iowa constitutional provisions for equal protection; (e) the doctrines of promissory and equitable estoppel apply. We affirm.

In November, 1972, plaintiff was elected to the office of Johnson County Supervisor. In December of that same year, after he had been issued a certificate of election, but before he actually began to serve as a supervisor, plaintiff's election was contested. The former incumbent, whom plaintiff had defeated, filed an election contest alleging that plaintiff was not qualified for the office of supervisor because of an earlier Canadian felony conviction. Plaintiff took office and began to serve as a supervisor while the election contest was pending. The contest court eventually rejected the contestant's claim and ruled that plaintiff was qualified to serve as a supervisor. Thereafter, the contestant appealed to the district court which upheld the conclusion of the contest court. Plaintiff retained counsel to represent him during these proceedings. The presiding officer of the contest court was represented and advised by the county attorney and/or three specially-retained attorneys during

the contest case and various ancillary actions. All costs and attorney's fees for the presiding officer were paid by the county. The county, however, refused to reimburse plaintiff for any expense. The plaintiff first sued the contestant for his attorney's fees, but that claim was disallowed by the supreme court in *Walters v. Bartel,* 254 N. W. 2d 321 (Iowa 1977). Plaintiff then commenced this suit against the county for reimbursement of his attorney's fees. The district court denied relief on the ground that plaintiff was not acting in his official capacity in defending the election challenge. From this judgment plaintiff appeals.

I. Scope of Review. Since this is an action in equity, our review is de novo. Iowa R. App. P. 4; *Devine v. Wonderlich,* 268 N. W. 2d 620, 623 (Iowa 1978). We review the facts as well as the law to determine anew from the credible evidence all properly presented and preserved contentions. *Miller v. American Wonderlands, Inc.,* 275 N. W. 2d 399, 402 (Iowa 1979).

II. Official Capacity. Plaintiff argues that the county attorney's office was obligated by the terms of section 336.2(6), The Code, to represent him in the contest court and any derivative proceedings, but that office was under a disability because of its relationship with the presiding officer of the contest court. Plaintiff thus contends that section 336.2(6) gives rise to an implied contract between him and defendant requiring defendant to pay his privately retained attorneys' fees. In the alternative, plaintiff argues that the county would be unjustly enriched from plaintiff's expenditure of attorneys' fees for legal services that the county was required to provide.

We first note that attorneys' fees are not recoverable unless authorized by statute or contract. *Virginia Manor, Inc. v. City of Sioux City*, 261 N. W. 2d 510, 513 (Iowa 1978); *Walters v. Bartel*, 254 N. W. 2d 321, 322 (Iowa 1977). To establish his claim, plaintiff relies on section 336.2(6), which provides:

> [It shall be the duty of the county attorney to:] (6) commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

Plaintiff contends that his certification as the winner of the election placed him in the official capacity of incumbent, that the contestant sued him in this capacity, and that his claim, therefore, falls within the purview of section 336.2(6). While we find no Iowa cases delineating the scope of an officer's official capacity under this code section, we conclude, in agreement with the district court, that it does not encompass an officer's efforts to retain his office. We believe the phrase "in his official capacity" means only his capacity when acting for and in behalf of the county. *See United States v. Waylyn Corp.*, 130 F. Supp. 783, 786 (D. P. R. 1955).[1] In the contest case,

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[1]Our review of Iowa cases addressing an officer's "official capacity" reveals that such cases involve affirmative acts or nonfeasance only; there is no authority for plaintiff's proposition that the phrase encompasses a mere state of being. See for example: *Lerdall Constr. Co. Inc. v. City of Ossian*, No. 66059, slip op. at 2 (Iowa April 21, 1982) (mayor and councilmembers contract on behalf of municipality); *In re Trust of Gabeline*, 288 N. W. 2d 341, 343 (Iowa 1980) (administration of trust by county supervisors for benefit of county); *Blanton v. Barrick*, 258 N. W. 2d 306, 308 (Iowa 1977) (prosecutor's immunity for acts done in his official capacity); *Harryman v. Hayles*, 257 N. W. 2d 631, 637 (Iowa 1977) (negligence of county supervisors and engineer); *Morrison v. State*, 179 N. W. 2d 439, 440 (Iowa 1970) ("Employee of the State" includes persons acting on behalf of the state in any official capacity.)

plaintiff was not acting in behalf of Johnson County but was merely defending, for his own benefit, his personal right to hold the office to which he was elected. His additional contention that he was defending the interest of the plurality of voters who elected him to office, likewise is unpersuasive. Those voters have no interest in defending an officeholder against charges that he is statutorily disqualified from holding office. Their interest is in seeing a qualified candidate placed in office.

Further, we believe the language of chapter 62, The Code, which governs election contests of county officers, supports our conclusion that the contest is a private action which does not require compensation for expenses by the county. Section 62.24 states that costs shall be assessed against the loser of the contest but establishes no liability on the part of the county. We believe this assessment of costs to the individual reflects the legislature's intent that this action is of a private nature. *Cf.* Iowa R. Civ. P. 299-305, (quo warranto proceedings).

Because we conclude plaintiff was not acting in his official capacity, we find no duty upon the county attorney to act under section 336.2 (6). There thus was no unjust enrichment or implied contract upon which to base the county's liability for plaintiff's attorney fees.

III. Implied Trust. Plaintiff's second argument is that he should be awarded attorney's fees on the basis of an implied trust. This theory, as argued by plaintiff, follows the Missouri rule that:

> Where one goes into a court of equity and takes the risk of litigation on himself and successfully creates, protects, or preserves a fund or brings about the creation, increase, or protection of a fund in which

> others are entitled to share, those others will be required to contribute their proportionate part of counsel fees and expenses, and the equitable way to apportion these fees and expenses is to allow them against the fund.

Jesser v. Mayfair Hotel, Inc., 360 S. W. 2d 652, 661 (Mo. 1962). We note that the Iowa Supreme Court has followed a similar rule where an attorney renders services in recovering or preserving a fund in which a number of persons are interested. *See Tucker v. Nason*, 249 Iowa 496, 499, 87 N. W. 2d 547, 548 (1958). While these cases involve the recovery or preservation of a fund, plaintiff argues that the rule should be extended to any case where a substantial benefit upon others is conferred. As authority for extension of this principle, plaintiff cites *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). The principle as established by the United States Supreme Court in *Mills* is:

> While the general American rule is that attorney's fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others *in the same manner as himself*. [citation] To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. (emphasis added)

396 U. S. at 391-92, 90 S. Ct. at 625, 24 L. Ed. 2d at 606.

We are not persuaded that this analysis applies to the instant case. Here, the group that is allegedly benefited from plaintiff's efforts is not benefitted in the same

manner as he is. Plaintiff is the only member of this hypothetical group that is capable of holding the elected office. Further, as we concluded above, the public has no interest in defending a specific officeholder against charges that he is statutorily disqualified from holding that office. We thus find no basis for awarding attorney's fees on the theory of an implied trust.

IV. Private County Attorney. Plaintiff next argues that he is entitled to receive attorney's fees because his attorney acted as a private county attorney. He asserts that the judiciary has the inherent power to appoint special assistants to the county attorney in carrying out required duties where the regular county attorney is disqualified. Accordingly, since the Johnson County Attorney was disqualified due to a conflict of interest by representing the presiding officer of the election contest, plaintiff should be awarded attorney's fees for privately retaining counsel to carry out the county attorney's duties. Because we have found that the county attorney was under no obligation to represent plaintiff in this action, we conclude that plaintiff's privately retained counsel fulfilled no duties otherwise required of the county attorney. Further, we reject plaintiff's reliance on *Serrano v. Priest,* 569 P. 2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977), wherein the California Supreme Court allowed attorney's fees on the basis that (1) the litigation resulted in the vindication of a strong or socially important public policy; (2) the necessary cost of securing this result transcends the individual plaintiff's pecuniary interest to an extent requiring subsidization; (3) a substantial number of persons benefited from the decision on the merits of the challenge. We have concluded above that plaintiff was vindicating a personal right in the election contest,

not the franchise interests of the electorate of Johnson County; we thus further conclude that the cost of defending that right did not transcend his individual interest to an extent requiring subsidization.

V. Equal Protection. Plaintiff next argues that since Johnson County and the Iowa State Legislature have awarded attorney fees in the past, it would be unconstitutionally discriminatory treatment to deny plaintiff attorney's fees here. Having reviewed the record before the district court, we find no basis on which to find any violation of the equal protection clauses of the United States or Iowa Constitutions.

A. Johnson County. Plaintiff asserts that because Johnson County officials were awarded both costs and attorney's fees for their involvement in the election contest and ancillary proceedings, denial of an award of attorney's fees to him is a violation of the equal protection. We find no merit to this analysis. Again, we state our conclusion set forth in division II of this opinion: plaintiff was not acting in his official capacity in defending the election contest. Since those officials who received attorney fees were acting in their official capacity, we find a rational distinction between the two classes of litigants. *See Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W. 2d 550, 557 (Iowa 1980). We thus conclude there was no violation of plaintiff's right to equal protection.

V. Legislative Action. Plaintiff further argues that, since the legislature has enacted private bills for compensating state office holders who withstand an election contest, it is a denial of equal protection and discrimina-

tory for plaintiff to be denied the same benefits. We disagree.

First, we note that there is no evidence that plaintiff applied to the legislature for such a private bill of remuneration. Second, we reject his contention that denial of his claim by the county board of supervisors is, in effect, denial by the Iowa legislature. While a county is a governmental instrumentality or division of the State, it is not solely an "administrative" arm of the state government. *Mandicino v. Kelly,* 158 N. W. 2d 754, 760 (Iowa 1968) citing *Hanlon v. Towey,* 274 Minn. 187, 198, 142 N. W. 2d 741, 747 (1966). ". . . [T]he county board's power with respect to taxation, the county budget, capital improvements, welfare, health, the administration of justice, zoning, and many other areas of public service is quite different in variety and scope than that possessed by an administrative or special-purpose unit of government." *Hanlon,* 274 Minn. at 198, 142 N. W. 2d at 747. In view of the substantial quantum of legislative power vested in the county governments, we view it as a separate entity and not as a mere agent of the Iowa legislature. We thus reject plaintiff's argument that the county, in denying his request for attorney's fees, has acted for the state legislature for that purpose.

Further, addressing the merits of plaintiff's equal protection claim, we find it wholly unsupported by evidence of either a classification or discrimination. While plaintiff has cited examples of individuals receiving compensation through special legislation by the Iowa legislature, plaintiff has not shown any evidence that these bills are always or regularly passed in favor of state officeholders who are required to defend in an election contest. We believe

this failure in the evidence defeats plaintiff's claim that a variance in his treatment from that of such state officeholders imposes an unconstitutional additional requirement for election to county office. Plaintiff also offers no evidence concerning the denial of private bills to county officeholders as a class. We thus conclude plaintiff has wholly failed to support his claim of a denial of equal protection.

VI. Promissory Estoppel and Equitable Estoppel. Plaintiff's final argument is that promissory estoppel or equitable estoppel should be invoked to require his award of attorney's fees. He contends that the fact he was accepted as a county officer entitles him to all rights and privileges of any other county officer, including legal representation by the county attorney. Assuming, without deciding that defendant was so entitled, it is clear from the foregoing analysis that representation by the county attorney was not one of the rights or privileges conferred to plaintiff, as he was not interested in the litigation in his official capacity.

Finding no error by the district court, we affirm its judgment.

AFFIRMED.

DONIELSON, J. (dissenting)

I respectfully dissent.

I agree with plaintiff's argument that the county attorney's office was obligated by the terms of section 336.2 (6), The Code, to represent him in the contest court and any derivative proceedings but that office was under a dis-

ability because of its relationship with the presiding officer of the contest court.

Section 336.2 (6) provides:

> [It shall be the duty of the county attorney to:] (c) commence, prosecute and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.

In my opinion the election contest was clearly initiated against plaintiff in his *"official capacity" after he was certified and declared an incumbent* pursuant to section 57.3, The Code 1971, and is a suit in which he "is interested, or a party." The language of section 336.2 (6) should be "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Section 4.2, The Code. It is obvious the purpose of section 336.2 (6) was not to require county officers to pay for their own legal defense in suits which arise solely out of their status as a county official. Furthermore, in my opinion the majority's decision will discourage qualified persons from seeking and holding public office if they are required to personally pay attorney fees in the event their election is contested. Therefore, I believe plaintiff should be entitled to reimbursement for the costs he incurred privately defending the election contest due to the county attorney's disability.

I would reverse the trial court and remand for a hearing to determine a reasonable amount of attorney fees to be awarded to plaintiff.

Oxberger, C. J., joins this dissent.

APPENDIX D

NO. 44054

RICHARD BARTEL,

Plaintiff,

vs.

JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT DECREE

Hearing was held in chambers on Plaintiff's Petition in Equity on December 23, 1980. Plaintiff was represented by Attorney Jon Kinnamon. Defendants were represented by Assistant Johnson County Attorney J. Patrick White.

FINDINGS OF FACT

A stipulation of evidence was filed in this case. The only apparent conflict in the stipulation is whether Supervisors Burns and another Johnson County supervisor's attorney fees were paid by the county in a case where they were charged with violating the open meeting law. This stipulation will stand as findings of facts in this case and is received in evidence, along with the exhibits.

CONCLUSIONS OF LAW

The Court reluctantly concludes that it will not order the attorney fees of Plaintiff, Richard Bartel, to be paid by Johnson County.

Iowa Code Section 336.2 (6) recites that it shall be the duty of the County Attorney to "commence, prosecute and defend all actions and proceedings in which any county officer *in his official capacity,* or the county, is interested, or a party" (italics by this Court).

It is Plaintiff's very capacity as a member of the Board that was at issue. Being sued in his capacity would appear to mean relating to actions or inactions involving his duties and performance as a county supervisor, not whether he was entitled to the post in the first place. In the instance of any attorney's compensation paid to represent Mr. Burns in his declaratory judgment action, it is to be noted that performing in this role as President of the Contest Court was a statutory duty imposed upon him as chairman of the Board of Supervisors. The same can be said as it pertains to defending the open meeting law case, as this involved their actions as supervisors, not whether they were qualified to hold the office in the first place. Many people would not want to hold public office if they had to pay an attorney to defend their official actions.

In view of this holding that there was no duty to defend by the County Attorney, the contentions of unjust enrichment, implied contract, implied trust, and "private county attorney" theories of recovery must fall.

So also must the theory of due process and equal protection. Even if arguably illegal, said payments were apparently not challenged. A different situation is involved in election contests where attorney fees have been paid by legislative private bills. Again, it is arguable that this is a matter of legislative sufferance, not a matter of right.

It is also a case of protecting the integrity of the mechanical vote counting process, not a case of determining ab initio qualifications for the office of a particular candidate. Again, the fact that conceivably legally challengeable attorney fees were paid in the past in other cases would not warrant granting said attorney fee allowances in the future in other cases, in absence of legal authority to make such payment.

The Court concedes that it is arguable that by not challenging the Plaintiff until after the election, the public was deprived of the right to select another candidate in the primary and that they were deprived of a choice. However, at least official, it was the unsuccessful candidate who challenged Plaintiff. This situation would be true had the successful candidate died or become disabled after election, whereby the lawful selection process to fill a vacancy would have to be utilized.

The fact that no attempt was made by county officials to prevent him from taking office alled (sic) him to participate in the duties of office during the limited term and allowed him to be paid without awaiting the outcome of the challenge. It should not be grounds for obviating a legal incapacity should such incapacity have been ultimately found to exist. The Court does not hold that he can benefit from a theory of promissory estoppel.

It is regrettable that parties must become liable for attorney fees in asserting, even successfully, their legal rights. However, except as in cases such as dissolution of marriage and condemnation cases or in contempt actions, where there is statutory provision for allowance of attorney fees, or in cases such as failure to give discovery where the Rules of Civil Procedure allow attorney fees

if justified, the parties must normally bear their own legal fees. Even in automobile cases, the compensable recovery must bear the attorney fees.

However, even absent any duty of the County Attorney, the Court frankly feels that Mr. Bartel should be compensated for reasonable attorney fees in this case. This ruling is not meant to preclude the Board from allowing compensation of attorney fees as a matter of equity and discretion if it can be lawfully done in the nature of a private bill or by seeking such a private bill from the legislature. Again, the Court opines, as it did in its ruling of April 30, 1975, in *Waters v. Barte'*, No. 42137, that:

> "It would appear that there should be some provisions for a good-faith contestant and incumbent to be reimbursed for his attorney fees. . . . Perhaps there should be Legislation that could provide a public fund for reimbursement of good-faith parties to an election contest for expenses, including reasonable attorney fees."

JUDGMENT DECREE

Judgment is rendered in favor of Defendants, Members of Johnson County Board of Supervisors (not individually, but in their capacity as elected representatives of Johnson County), Lorada E. Cilek, Chairperson, Harold M. Donnelly and Donald F. Sehr, and against Plaintiff, Richard Bartel, and his Petition, as amended, is hereby dismissed in its entirety.

Costs are assessed to Plaintiff.

Clerk to furnish a copy of this entry to counsel of record.

Dated this 19th day of February, 1981.

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Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-790

In The

Supreme Court of the United States

October Term, 1982

RICHARD BARTEL,

Petitioner,

vs.

JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is a County legally obligated to pay the Attorney Fees and costs incurred by a winning candidate in a county election contest, and in derivative lawsuits, where the candidate's eligibility for office was at issue in the contest proceedings and there is no statutory provision allowing the award?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, Johnson County and the Johnson County Board of Supervisors, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Iowa Court of Appeals in this case.

AUTHORITIES AND ARGUMENT

1. The Court below fully considered and correctly decided the issues. No fund or other public benefit resulted from Petitioner's defense of the election contest as would give rise to an implied trust or a right to the services of a private county attorney. Cases relied upon by Petitioner are clearly distinguishable on their facts.

2. This case does not present important questions of federal constitutional law. Plaintiff was vindicating a personal right in the election contest not the franchise interests of the electorate.

The Iowa Court of Appeals did not err in denying recovery of attorney fees and costs under theories of "implied trust" and "private county attorney". No fund or other public benefit resulted from petitioner's defense of the election contest as would give rise to an implied trust. Petitioner defended in the election contest for his own benefit, not for the benefit of the people of Johnson County.

Cases relied upon by Petitioner are clearly distinguishable on their facts. Unlike the case of *Devine v. Wonderlich*, 260 N. W. 2d 620, 623 (Iowa 1978), the issue in Petitioner's election contest was not whether certain votes should be counted, but whether Petitioner, Mr. Bartel, was statutorily qualified to be on the ballot in the first place. By defending in the contest action, Petitioner was not vindicating the franchise interest of the electorate. The public has no interest in defending an individual against charges that he is statutorily disqualified from holding office.

Petitioner's reliance on *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970), is similarly misplaced. In *Mills*, all shareholders in the corporation benefited in the same manner as the plaintiff in being afforded a means of enforcing the proxy statute. Unlike the plaintiff in *Mills*, Petitioner in the instant case did not benefit in the same manner as the electorate of Johnson County. The Iowa Court of Appeals correctly pointed out that Petitioner was the only one capable of holding office, and the fact that he was holding office conferred benefits upon him that were not shared by those who elected him. The interests of the electorate and those of the Petitioner were not identical.

This Court's decision in *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U. S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975), disposes of Petitioner's argument for recovery of attorney fees based on a theory of "private county attorney". In *Alyeska*, this Court discussed the rule that attorney fees are not ordinarily recoverable as costs. Only three non-statutory exceptions were recognized: (1) an implied trust, (2) willful disobedience to a court order, and (3) action by the losing party in bad faith, vexatiously or for oppressive reasons. None of these exceptions apply to Petitioner's case.

Petitioner requests that this Court consider his claim based on criteria set out in *Serrano v. Priest*, 569 P. 2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977). Even considered under his own criteria, Petitioner's case fails. Petitioner was not vindicating a strong or socially important public policy as is required by *Serrano*. He was merely defending his personal qualifications to hold office. Be-

cause there is no statute authorizing the award of attorney fees for the defense of the election contest, and because Petitioner failed to satisfy any of the non-statutory exceptions to the general rule, Petitioner had no right to the services of a "private county attorney".

Petitioner's defense of the election contest was not a defense of the franchise interests of the electorate. What was at issue in the election contest was whether Petitioner personally was qualified to serve in the official capacity of a County Supervisor. It was not the political will of the voters that was challenged. Petitioner was a private citizen defending his election to public office. If the Court below had found that Petitioner was statutorily disqualified from holding office, he would have been removed from office regardless of the plurality of votes that he received. This Court has, of course, deemed the political franchise fundamental to democratic government. *Wesberry v. Sanders,* 376 U. S. 1, 17-18, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). However, Petitioner's personal qualification under statute, not the political franchise interests of the people, was the matter at issue. Therefore, no question of federal constitutional law is presented.

CONCLUSION

For the reasons set forth above, this Court should deny the request for a writ of certiorari.

Respectfully submitted,

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